85-570

Supreme Court, U.S.
FILED
OCT 2 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-.....

IN THE

Supreme Court of The United States

OCTOBER TERM, 1985

PAT S. HOLLOWAY,

Petitioner,

v.

JUDGE DEE BROWN WALKER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REYNOLDS, ALLEN COOK
Incorporated
THOMAS D. CORDELL
JOE H. REYNOLDS
J. BRUCE BENNETT
KAY K. PIERCE
3300 Allied Bank Plaza
Houston, Texas 77002
(713) 651-1300
Attorneys for Petitioner

October 4, 1985

12 pgs

QUESTIONS PRESENTED

1. Whether Texas State District Judge Dee Brown Walker acted in the clear absence of jurisdiction within the meaning of *Stump* v. *Sparkman*, 435 U.S. 349, 98 S. Ct. 1099, 55 L. Ed.2d 331 (1978), when he continued to hold Petitioner's corporation, Humble Exploration Company, Inc., in receivership after the Texas Court of Appeals at Dallas issued a Writ of Prohibition against Judge Walker expressly informing him that he "had no jurisdiction to conduct a continuing, ongoing receivership of Humble Exploration Company, Inc., or its property, assets and business."

2. Whether Petitioner's allegations that a private agreement existed between Judge Walker and the other defendants below to decide, in advance of trial or of judgment, the outcome of the case against Petitioner shows the commission of a nonjudicial act within the meaning of *Stump* v. *Sparkman*.

3. Whether Judge Walker lost his judicial immunity by violating his ministerial duty to obey forthwith the orders of the Texas Court of Appeals at Dallas "to absolutely desist and refrain from taking or permitting any further action or proceeding in the receivership of Humble Exploration Company, Inc., or any of its property, assets and business . . . ."

TABLE OF CONTENTS

	PAGE
Questions Presented	i
Table of Authorities	iii
Opinions Below	1
Jurisdiction	1
Statement of the Case	1
Reasons for Granting the Writ	3
Conclusion	5
Certificate of Service	7

TABLE OF AUTHORITIES

Cases:

	PAGE
Amy v. The Supervisors, 78 U.S. (11 Wall) 136 (1870)	5
Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 69 S. Ct. 1221, 93 L. Ed. 152 (1949)	2
Dennis v. Sparks, 449 U.S. 24, 101 S. Ct. 183, 66 L. Ed.2d 185 (1980)	4
Ex Parte Virginia, 100 U.S. 339 (1879)	5
Humble Exploration Company, Inc., v. Walker, 641 S.W.2d 941 (Tex. App. — Dallas 1982, writ ref'd n.r.e.)	4
Mower v. Fletcher, 114 U.S. 127 (1885)	5
Rankin v. Howard, 633 F.2d 844 (9th Cir. 1980), cert. denied, 451 U.S. 939, 101 S. Ct. 2020, 68 L. Ed.2d 326 (1981)	2, 3, 4
Sassower v. Finnerty, 465 N.Y. Supp.2d 543 (N.Y.A.D. — Dept. 1983)	5
Stump v. Sparkman, 435 U.S. 349, 357, 98 S. Ct. 1099, 1105, 55 L. Ed.2d 331 (1978)	2, 3, 6
Roberts v. United States Ex Rel. Valentine, 176 U.S. 221, 20 S. Ct. 376 (1900)	5
Turner v. Raynes, 611 F.2d 92, (5th Cir. 1980), cert. denied, 449 U.S. 945, 101 S. Ct. 269, 66 L. Ed.2d 129 (1980)	3

Secondary Authorities

2 HARPER & JAMES, THE LAW OF TORTS (1956)	5

No. 85-.....

IN THE

Supreme Court of The United States

OCTOBER TERM, 1985

PAT S. HOLLOWAY,

Petitioner,

v.

JUDGE DEE BROWN WALKER, ET AL.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 765 F.2d 517 (5th Cir. 1985). The order of the District Court is not officially reported.

JURISDICTION

The judgment of the Court of Appeals was entered on July 18, 1985. The Petitioner timely filed a Suggestion for *En Banc* Consideration. On September 4, 1985, this Suggestion was denied. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

On November 18, 1982, Petitioner Pat S. Holloway along with Humble Exploration Company, Inc., and Sterling Pipeline Corporation, the stock of which is wholly owned by Petitioner, filed a complaint under 42 U.S.C. § 1983 against Texas State

District Judge Dee Brown Walker and the other defendants below alleging a conspiracy to violate Petitioner's federal constitutional rights, and seeking monetary, injunctive, and declaratory relief against all defendants, jointly and severally.

On December 7, 1982, Judge Walker filed a motion to dismiss the complaint on the ground that the doctrine of judicial immunity barred suit against him. On August 21, 1984, the District Court denied Judge Walker's motion to dismiss, holding that the complaint sufficiently alleged facts showing that Judge Walker had committed certain nonjudicial acts thereby forfeiting his judicial immunity. Judge Walker appealed from the District Court's order of denial, and on April 9, 1985, Judge Walker's appeal was orally argued before the Fifth Circuit.

On July 18, 1985, a split panel of the Fifth Circuit rendered its decisions. The majority opinion held that all of the wrongful actions taken by Judge Walker were not performed in the clear absence of all jurisdiction; that the Fifth Circuit would not follow the Ninth Circuit case of *Rankin* v. *Howard*, 633 F.2d 844 (9th Cir. 1980), *cert. denied*, 451 U.S. 939, 101 S. Ct. 2020, 68 L. Ed.2d 326 (1981), which holds that a judge forfeits his judicial immunity if, prior to trial or judgment, he privately agrees to decide a case in favor of one party; and that Judge Walker's appeal from the denial of his motion to dismiss was appealable under *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949). Judge Johnson, in a dissenting opinion, wrote that the District Court's denial of Judge Walker's motion to dismiss should be affirmed because "the Plaintiffs have sufficiently alleged acts committed after the Texas Court of Appeals' mandamus order which were 'in the clear absence of all jurisdiction.' *See Stump* v. *Sparkman*, 435 U.S. 349, 357, 98 S. Ct. 1099, 1105, 55 L. Ed.2d 331 (1978)."

REASONS FOR GRANTING THE WRIT

First. In *Stump* v. *Sparkman*, this Court recognized that a judge of a court of general jurisdiction, like Judge Walker, loses his immunity if he considers matters over which his jurisdiction has been foreclosed or circumscribed by case law or by statute. 98 S. Ct. at 1105-06. If Judge Stump had considered the sterilization petition and ordered the child sterilized even after an Indiana appellate court had expressly told him that he had no jurisdiction to act on those matters, then Judge Stump would have been held personally responsible in damages to the child. In holding that Judge Walker did not act in the clear absence of jurisdiction, even though a Texas appellate court expressly told him that he had no jurisdiction to keep Petitioner's corporation, Humble Exploration Company, Inc., in receivership, the Fifth Circuit has clearly misconceived the meaning of the decision in *Stump*.

The Fifth Circuit's holding in this case is not only in conflict with *Stump* but also in conflict with its prior decision in *Turner* v. *Raynes*, 611 F.2d 92, 95 (5th Cir. 1980), *cert. denied*, 449 U.S. 945, 101 S. Ct. 269, 66 L. Ed.2d 129 (1980) and with the Ninth Circuit's decision in *Rankin* v. *Howard*, 633 F.2d 844 (9th Cir. 1980), *cert. denied*, 451 U.S. 939, 101 S. Ct. 2020, 68 L. Ed.2d 326 (1981). In *Turner*, the Fifth Circuit, citing *Stump*, stated: "A clearly inordinate exercise of unconferred jurisdiction by a judge—one so crass as to establish that he embarked on it either knowingly or recklessly—subjects him to personal liability." In *Rankin*, the Ninth Circuit, relying both on *Stump* and *Turner*, held that a judge forfeits his immunity when he "knows that he lacks jurisdiction, or acts in the face of clearly valid statutes or case law expressly depriving him of jurisdiction . . . ." 633 F.2d at 849.

In reaching its decision, the Fifth Circuit has also misinterpreted the opinion of the Texas Court of Appeals at Dallas, wherein it issued the Writ of Prohibition against Judge Walker.

Humble Exploration Company, Inc., v. *Walker*, 641 S.W.2d 941 (Tex. App. — Dallas 1982, writ ref'd n.r.e.) The Fifth Circuit reasoned that the Texas Court of Appeals did not hold that Judge Walker had no subject matter jurisdiction, but instead held that Judge Walker was acting in excess of his jurisdiction. In its opinion, however, the Texas Court of Appeals expressly stated that the question before it was whether Judge Walker was acting "in the *absence* of jurisdiction." (Emphasis added.) The Texas Court of Appeals then held that "the trial court [Judge Walker] was *without jurisdiction* to continue the receivership following our order." (Emphasis added.) As these statements plainly demonstrate, the Texas Court of Appeals indisputably held that Judge Walker had *no* jurisdiction to act—not that he had merely exceeded his jurisdiction.

Second. The Fifth Circuit acknowledged that the Ninth Circuit in *Rankin* had held that a judge's prior private agreement to decide in favor of one party is not a judicial act. Nevertheless, the Fifth Circuit expressly refused to follow *Rankin* declaring: "This Court does not follow *Rankin*" because it is "inconsistent with the fundamental policies underlying judicial immunity."[1]

Petitioner would respectfully submit that this conflict among the Fifth and Ninth Circuits should be resolved by this Court. The key issue that this Court should resolve is whether a judge should be permitted to hide beneath the cloak of judicial immunity when specific allegations of a conspiracy between the judge and others to rig a case are clearly and specifically alleged by a plaintiff in a federal civil rights complaint. This issue is of undeniable public and professional importance.

---

[1] In criticizing *Rankin*, the Fifth Circuit placed great reliance upon *Dennis* v. *Sparks*, 449 U.S. 24, 101 S. Ct. 183, 66 L. Ed.2d 185 (1980), but failed to acknowledge in its citation of *Rankin* that this Court had refused a writ of certiorari in *Rankin* following its decision in *Dennis*.

Third. The Fifth Circuit's disposition of this case also conflicts with this Court's opinion in *Ex Parte Virginia*, 100 U.S. 339 (1879), which holds that a judge loses his immunity when he violates a ministerial duty.[2] Judge Walker had a ministerial duty to obey the order of the Texas Court of Appeals commanding him to discharge Petitioner's corporation, Humble Exploration Company, Inc., from receivership proceedings. Judge Walker, however, willfully defied that order and continued to keep Humble in receivership. This Court should decide the issue of whether immunity should be accorded a judicial officer who refuses to obey his ministerial duty to execute orders of an appellate court in order to injure others. The opinions of the Texas Court of Appeals, particularly its opinion of August 30, 1982, wherein the Writ of Prohibition was issued against Judge Walker, clearly raise this issue, for the August 30, 1982, opinion told Judge Walker that he had no jurisdiction; it defined his duty in clear and precise language; and it ordered him to discharge that duty immediately, which he knowingly refused to do.[3]

CONCLUSION

This Court is presented with the unparalleled conduct of a judge who openly and willfully defied orders of an appellate court informing him not only that he had no jurisdiction to act in proceedings pending in his court but further commanded him to terminate those proceedings immediately. This Court is also presented with a situation where the District Court below has held that there is competent summary judgment evidence that Judge Walker and an attorney for one of the defendants were privately conspiring to deprive Petitioner of a fair trial. It must

---

[2] The common law has never accorded a judge judicial immunity for violating a ministerial duty. See 2 HARPER & JAMES, THE LAW OF TORTS, at 1645-46 (1956). *Sassower* v. *Finnerty*, 465 N.Y. Supp.2d 543 (N.Y.A.D.-Dept. 1983). *Cf. Amy* v. *The Supervisors*, 78 U.S. (11 Wall) 136, 138 (1870); *Roberts* v. *United States Ex Rel. Valentine*, 176 U.S. 221, 231, 20 S. Ct. 376, 379-80 (1900).

[3] See *Mower* v. *Fletcher*, 114 U.S. 127 (1885).

be noted that Petitioner has satisfied all the procedural hurdles heretofore erected by the federal courts to weed out frivolous and questionable claims of wrongdoing by judges. Yet the Fifth Circuit, by misunderstanding *Stump*, has changed the rules, created a conflict in the Circuit Courts, and placed before Petitioner a new hurdle that is plainly contrary to *Stump*.

WHEREFORE, PREMISES CONSIDERED, Petitioner prays that a Writ of Certiorari issue to the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

REYNOLDS, ALLEN & COOK
Incorporated

By Thomas D. Cordell

THOMAS D. CORDELL
JOE H. REYNOLDS
J. BRUCE BENNETT
KAY K. PIERCE
3300 Allied Bank Plaza
Houston, Texas 77002
(713) 651-1300

Attorneys for Petitioner
PAT S. HOLLOWAY

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served by certified mail, return receipt requested, this 4th day of October, 1985, upon Mr. Bruce W. Claycombe and Mr. Morgan A. Jones, of Jones & Claycombe, Attorneys for Respondent, 2626 LTV Tower, 1525 Elm Street, Dallas, Texas 75201.

Thomas D. Cordell

THOMAS D. CORDELL

85-570

Supreme Court, U.S.
FILED
OCT 2 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-.....

IN THE

Supreme Court of The United States

OCTOBER TERM, 1985

PAT S. HOLLOWAY,

Petitioner,

v.

JUDGE DEE BROWN WALKER,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REYNOLDS, ALLEN COOK
Incorporated
THOMAS D. CORDELL
JOE H. REYNOLDS
J. BRUCE BENNETT
KAY K. PIERCE
3300 Allied Bank Plaza
Houston, Texas 77002
(713) 651-1300
Attorneys for Petitioner

October 4, 1985

4 1PP

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. 3-82-1846-H

PAT S. HOLLOWAY, ET AL.

Plaintiffs,

v.

JUDGE DEE BROWN WALKER, ET AL.

Defendants.

MEMORANDUM OPINION AND ORDER

Before the Court are the Motions to Dismiss filed by Defendants Dee Brown Walker ("Walker"), John Wright ("Wright"), J.R. Hurt ("Hurt"), and Whitley R. Sessions ("Sessions"); and Plaintiffs' Responses to Defendants' Motions. For reasons stated herein, Defendants' Motions are hereby DENIED.

Walker initially contends that Plaintiffs' Complaint should be dismissed for want of subject matter jurisdiction and for failure to state claim upon which relief may be granted. The long-standing test for dismissal of a § 1983 complaint requires the Defendants to show that the Plaintiffs can prove no set of facts which would entitle them to relief. *Conley* v. *Gibson*, 355 U.S. 41 (1957). Plaintiffs' fact allegations must be accepted as true for purposes of Defendants' motions. *Johnson* v. *Wells*, 566 F.2d 1016 (5th Cir. 1978).

Defendant Walker specifically asserts that Plaintiffs' complaint should be dismissed since Walker is entitled to absolute judicial immunity. The Court is aware that a judge is unqualifiedly immune from suits under 42 U.S.C. § 1983 for the damages occasioned by his judicial acts. *Stump* v. *Sparkman*, 435 U.S. 349 (1978); *Pierson* v. *Ray*, 386 U.S. 547 (1967). A

judge will not be deprived of immunity when he acts in error, maliciously, or in excess of his authority. Rather, a judge is subject to liability only when he has acted in clear absence of all jurisdiction over the subject matter before him. *Stump* v. *Sparkman,* 435 U.S. at 356. Thus, in determining whether Walker is entitled to immunity, the Court must assess whether Walker's actions, as alleged in Plaintiffs' complaint, were "judicial acts", and if so, whether Walker's actions fall clearly outside his jurisdiction. *Harper* v. *Merckle,* 638 F.2d 848, 858 (5th Cir. 1981), *cert. denied,* 454 U.S. 816 (1982).

In determining whether Walker's acts were "judicial acts", the Fifth Circuit looks at four factors: (1) whether the precise acts complained of are normal judicial functions; (2) whether the event involved occurred in the judge's chambers; (3) whether the controversy centered around a case then pending before the judge; and (4) whether the events arose directly and immediately out of a visit to the judge in his official capacity. *McAlester* v. *Brown,* 469 F.2d 1280, (5th Cir. 1972). The Court is forced to conclude that several of Walker's alleged acts do not qualify as "judicial acts" under the Fifth Circuit test. These allegations include, but are not limited to, conspiratorial meetings which took place outside Walker's chambers and occurred before and after the relevant cases were pending before Walker.

The Court is aware of the serious justification for the doctrine of judicial immunity. Judges should not be harassed by the threat of having to defend themselves against suits by disgruntled litigants, and exceptions to the judicial immunity doctrine should be reserved for extraordinary causes. *See Pulliam* v. *Allen,* 104 S.Ct. 1970, 1979 (1984). However, occasionally there are extraordinary cases, and Plaintiffs' allegations against Walker, which the court must by law accept as true for purposes of these Motions, constitute such a case.[1] Walker's Motion to Dismiss is accordingly DENIED without prejudice.

---

[1] The Court stresses that Plaintiffs' claims against all Defendants are only allegations at present, and that Rule 56, Fed.R.Civ.P., provides a means for piercing a complaint's allegations.

Wright, Hurt and Sessions each claim that they are entitled to dismissal of Plaintiffs' allegations against them because Walker's judicial immunity extends to their actions as a court-appointed receiver, accountant, and attorney, respectively. The Court has ruled that Walker is not presently entitled to judicial immunity for purposes of these motions. Furthermore, Plaintiffs' Complaint makes sufficient allegations against Wright, Hurt and Sessions which, when accepted as true, defeat Defendants' claims of judicial and quasi-judicial immunity.[2]

Hurt and Sessions also contend that they are entitled to dismissal on the grounds that they, as employees of court-appointed receiver Wright, acted in good faith. Hurt and Sessions cite no basis for this good faith exception, other than their judicial immunity arguments which the Court has rejected. In addition, Plaintiffs have made allegations of Hurt and Sessions' actions demonstrating a lack of good faith which satisfy Rule 12(b)(6) standards. Defendants Walker, Wright, Hurt and Sessions' Motions to Dismiss are accordingly DENIED without prejudice.

SO ORDERED.

DATED: August 21, 1984.

.....

BAREFOOT SANDERS
UNITED STATES DISTRICT
JUDGE

---

[2] Hurt and Sessions assert that Plaintiffs lack standing to bring this suit. Plaintiffs have since added Don Navarro, Trustee of Plaintiffs' bankrupt estates, as a Plaintiff, rendering Defendants' standing arguments moot.

B-1

HOLLOWAY v. WALKER

No. 84-1772.

United States Court of Appeals, Fifth Circuit.

July 18, 1985.

PAT S. HOLLOWAY, ET AL.,

Plaintiffs-Appellees,

v.

JUDGE DEE BROWN WALKER, ET AL.,

Defendants,

JUDGE DEE BROWN WALKER,

Defendant-Appellant.

Section 1983 action was brought against state court judge who allegedly seized control of oil company through abuse of judicial office pursuant to bribe and conspiracy to deprive oil company's owners of their property without due process of law. The United States District Court for the Northern District of Texas, Barefoot Sanders, J., dismissed judge's motion to dismiss all claims against him and judge appealed. The Court of Appeals, E. Grady Jolly, Circuit Judge, held that: (1) complaint alleged that harm was inflicted by "judicial acts" to which absolute immunity would apply, even though resulting from bribe or conspiracy, and thus, failed to avoid judicial immunity; (2) all of the harms judge was claimed to have caused were alleged to have been perpetrated by him through judicial acts not performed in clear absence of all jurisdiction, barring damages claim against judge; (3) fact that many of the judge's alleged acts were performed outside the courtroom did not render the acts nonjudicial in nature; (4) denial of motion to dismiss for failure to state claim upon which relief could be granted was not appealable; and (5) judge was immune from federal suit seeking equitable relief on state law grounds.

Synopsis, Syllabi and Key Number Classification
COPYRIGHT © 1985 by WEST PUBLISHING CO.

The Synopsis, Syllabi and Key Number Classification constitute no part of the opinion of the court.

Reversed in part and dismissed in part.

Johnson, Circuit Judge, filed dissenting opinion.

1. Federal Courts 574

Federal Court of Appeals had jurisdiction to hear state court judge's appeal from federal district court's denial of judicial immunity from suit against the judge for damages despite district court's refusal to certify for interlocutory appeal under 28 U.S.C.A. § 1292(b), where, taking all well-pleaded facts as true, complaint was insufficient to avoid judge's immunity.

2. Judges 36

Where judge's absolute immunity would protect him from liability for performance of particular acts, mere allegations that he performed those acts pursuant to bribe or conspiracy will not be sufficient to avoid the immunity.

3. Civil Rights 13.12(3)

Complaint that Texas judge, through abuse of judicial office, seized control of oil company by, inter alia, arranging to have receivership action against the oil company brought before his court contrary to usual procedure for assigning cases and by appointing incompetent receiver and dismissing many key employees of oil company, all pursuant to bribe and conspiracy to deprive oil company's owners of their property without due process of law, alleged that harm was inflicted by "judicial acts" to which absolute immunity would apply, and thus, was insufficient to avoid judicial immunity; declining to follow *Rankin* v. *Howard*, 633 F.2d 844. U.S.C.A. Const. Amends. 5, 14; 42 U.S.C.A. § 1983.

See publication Words and Phrases for other judicial constructions and definitions.

4. Civil Rights 13.8(5)

All of the harms Texas judge was claimed to have caused in allegedly abusing judicial office to seize control of oil company pursuant to bribe and conspiracy were alleged to have been perpetrated by him through judicial acts not performed in clear absence of all jurisdiction, and accordingly, judge's immunity barred damages claim against him for the harms, where complaint alleged, inter alia, that many of the acts were committed in open defiance of proscriptive writ of Texas Court of Appeals ordering the judge to desist from interference in affairs of the oil company and where the Texas Court of Appeals did not characterize its writ as determination that the judge was without all subject matter jurisdiction in receivership proceedings against the company, but rather, noted that the judge's court did have subject matter jurisdiction, but that he was acting in excess of that jurisdiction in continuing to conduct proceedings in the face of effective order to desist. 42 U.S.C.A. § 1983.

5. Civil Rights 13.8(5)

Fact that many of Texas judge's acts in allegedly seizing control of oil company through abuse of judicial office pursuant to bribe and conspiracy to deprive oil company's owners of their property without due process of law were performed outside the courtroom did not render the acts nonjudicial in nature and did not affect the judge's immunity from liability for alleged resulting harms. 42 U.S.C.A. § 1983.

6. Federal Courts 555

Denial of motion to dismiss under Federal Civil Procedure Rule 12(b)(6) for failure to state claim upon which relief can be granted was not appealable. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

7. Civil Rights 13.8(5)

Judicial immunity does not extend to suits for equitable and declaratory relief under 42 U.S.C.A. § 1983.

8. Federal Courts 269,272

State official is immune from suit in federal court for equitable relief based on state law because Eleventh Amendment denies federal courts jurisdiction to issue such injunctions against state officials. U.S.C.A. Const.Amend. 11.

9. Judges 36

State court judge was immune from suit for equitable relief based on state law where the judge's alleged acts were judicial and not committed in clear absence of all jurisdiction. U.S.C.A. Const.Amend. 11.

Appeal from the United States District Court for the Northern District of Texas.

Before JOHNSON, JOLLY and HILL, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

This interlocutory appeal presents questions relating to the asserted defense of judicial immunity. Texas Judge Dee Brown Walker and other defendants are alleged to have seized control of Humble Oil pursuant to a conspiracy to deprive the legitimate owners of Humble of their property without due process of law. The appellee Holloway and others brought suit for damages and equitable relief under 42 U.S.C. § 1983, charging that Walker abused his office by imposing a receivership on Humble, appointing an incompetent administrator, and largely wrecking the corporation in accordance with the aims of the conspiracy. Walker moved to dismiss all claims against him arguing that the plaintiffs had failed to present allegations sufficient to warrant injunctive relief and, in addition, arguing that his judicial immunity bars this suit. The district court dismissed Walker's motion. Because we find the order denying immunity from damages is an appealable order, and that Walker is entitled to the protection of absolute judicial immunity from damages in this case, we reverse the district court, and order the dismissal of

the damages action against him. Moreover, we dismiss all pendent state law claims on eleventh amendment grounds. We find no other appealable order in this case, and accordingly dismiss the remainder of the appeal.

I

In reviewing this order denying dismissal, we do not go outside the pleadings. We accept all well pleaded facts as true and view them in the light most favorable to the plaintiff. *Carpenters Local Union No. 1846* v. *Pratt-Farnsworth, Inc.*, 690 F.2d 489, 500 (5th Cir.1982). We cannot order a dismissal "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley* v. *Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-02, 2 L.Ed.2d 80, 84 (1957); *Cook & Nichol, Inc.* v. *Plimsoll Club*, 451 F.2d 505, 506 (5th Cir.1971).

II

The complicated history of this case begins on September 12, 1979 when the Brownings, defendants in the present case, filed suit against Humble, Holloway and others in the 193rd Judicial District Court of Dallas County, Texas, seeking, as the alleged equitable owners of substantially all of the assets of Humble and Holloway, the imposition of a constructive trust on Humble's and Holloway's assets, actual and exemplary damages, and the appointment of an interim receiver to manage the disputed assets. Sterling Pipeline Company was later added to the case. (The lawsuit is hereinafter referred to as the "1979 case.") On November 19, 1979, Humble and Holloway filed Chapter 11 voluntary bankruptcy petitions and removed the 1979 case to the United States Bankruptcy Court for the Northern District of Texas, pursuant to 28 U.S.C. § 1478(a).

The parties entered a "Stipulation and Agreement on Manner in Which Controversy Shall Be Heard, Determined and Liquidated," which was approved by the bankruptcy court and annexed to the court's January 18, 1980 "Order Remanding Causes of Action and Modifying Automatic Stay." The remand order remanded the 1979 case to the 193rd Judicial District Court pursuant to the terms of the stipulation and agreement, and modified the automatic stay to permit trial of the case upon remand, subject to the terms of the stipulation and agreement. The stipulation and agreement provided, among other things, that upon remand of the case the parties would request the presiding judge of the administrative judicial district to assign a visiting or retired state judge to hear the consolidated cases.

The case was remanded and the presiding judge assigned it to a retired state judge who ordered enforcement of a prior settlement agreement. In 1981, the Court of Appeals for the Fifth Supreme Judicial District of Texas (the "Texas court of appeals") reversed the order enforcing the settlement agreement and remanded the case for a jury trial. The Texas Supreme Court found no reversible error. Upon remand from the state appellate courts, the 1979 case was assigned to a different retired state judge who entered an order nullifying the prior settlement agreement.

On May 26, 1982, a group of investors sued Holloway and Humble in the 162nd Judicial District Court of Dallas County, Texas, Judge Dee Brown Walker presiding, claiming that Humble had wrongfully shut-in over 150 oil and gas wells jointly owned by the investors and Humble. This suit is alleged by Holloway to have been brought pursuant to the conspiracy, solely for the purpose of creating a case before Walker into which the 1979 action could be consolidated, in violation of the agreement that restricted the judge who could hear the 1979 action to one who had retired or was visiting the judicial district. The investors sought the appointment of a receiver over Humble's assets. (The

case is hereinafter referred to as the "1982 case.") The Brownings were named as defandants in the 1982 case because of their claim to ownership of Humble's and Holloway's assets. The 1982 case was removed to the bankruptcy court and remanded to Judge Walker's court on the same day.

On May 28, 1982, Judge Walker appointed a receiver in the 1982 case over Humble's and Holloway's assets. Thereafter "ensued a somewhat dizzying sequence of state court orders," most of which were issued by Judge Walker, and recounted in *Browning* v. *Navarro,* 37 B.R. 201, 205-06 (D.C.N.D.Tex.1983), which resulted in the transfer and consolidation of the 1979 case into the 1982 case before Judge Walker in the 162nd Judicial District Court. On June 24, 1982, the May 28, 1982 receivership order having been vacated by the state court of appeals,[1] Judge Walker granted the Brownings' request for a separate and expedited trial of the 1979 case. On August 26, 1982, after a month-long trial, judgment was entered in the 1979 case for the Brownings, imposing a constructive trust on Humble's and Holloway's assets and awarding the Brownings actual damages of $72,000,000 and exemplary damages of $10,000,000.

On November 18, 1982, Holloway and Humble brought the action in which the present appeal is taken (the "civil rights case") against Judge Walker, the Brownings, legal counsel for the Brownings and many others, alleging that all the defendants had conspired to violate Holloway's and Humble's civil rights in the 1979 case. The complaint alleges that Walker and the other defendants conspired to seize control of Humble through the abuse of Walker's judicial office. Holloway contends that pursuant to the conspiracy Walker arranged to have the 1982 case brought before his court contrary to the usual procedure for

---

[1] *Humble Exploration Co.* v. *Fairway Land Co.,* 641 S.W.2d 934 (Tex.App.—Dallas 1982 writ ref'd n.r.e.) *enforced,* 641 S.W.2d 941 (Tex.App.—Dallas 1982, no writ).

assigning cases, that Walker thereafter arranged to have the 1979 and the 1982 cases consolidated in his court, that he imposed receiverships on Humble's and Holloway's assets, defied a mandamus order of the Texas Court of Appeals to refrain from interfering in Humble's business, appointed an incompetent receiver for Humble, dismissed many Humble personnel, posted guards at Humble's headquarters to seize the building, and, in a hotel near the courthouse, conducted meetings regarding Humble's business, all in furtherance of the conspiracy. Holloway contends extensive damage was done to him and Humble through Walker's pernicious actions. Holloway's complaint, broadly construed, may be interpreted to allege that Walker may have acted pursuant to a bribe, although the complaint does not use that word. Accordingly, we will treat the complaint as alleging both bribery and conspiracy.

Holloway's complaint requests damages as well as equitable and declaratory relief under section 1983. In addition, Holloway requests similar relief under Texas state law.

After Holloway and Humble filed the civil rights case they perfected an appeal from the judgment in the 1979 case to the Texas court of appeals. The Texas court of appeals was the appropriate Texas appellate court to hear the appeal of a case from Judge Walker's court. However, neither Humble nor Holloway posted a supersedeas bond to stay execution of the judgment in the 1979 case pending their appeal.

The Brownings then brought an action in the United States District Court (the "turnover action") to obtain possession of Holloway's and Humble's assets which, according to the judgment in the 1979 case, were being held for their benefit. Humble, Holloway and their trustee, Don Navarro, refused to turn the assets over to the Brownings. They argued that the proceedings before Judge Walker, an active judge, were void because the 1979 case was tried in contravention of the bankruptcy court's original remand order. The United States District Court

granted a summary judgment in favor of Navarro and held that the trial of the 1979 case before Judge Walker was void. This court, however, reversed the district court's determinations and held that the trial before Judge Walker was not void because the remand order had been satisfied. *Browning* v. *Navarro,* 743 F.2d 1059 (5th Cir.1984).

The appeal of the 1979 case was pending in the Texas court of appeals while the turnover action was being litigated in the United States District Court. The Texas court of appeals, however, believed that the turnover action constituted a collateral attack on Judge Walker's judgment in the 1979 case. Therefore, the Texas court of appeals dismissed Humble's and Holloway's appeal[3] because it did not believe Humble and Holloway were entitled to two appeals from the judgment in the 1979 case. However, following this court's reversal of the district court's decision in the turnover action, the Texas court of appeals vacated its prior order dismissing the appeal of the 1979 case. From the appellate briefs before us, it appears the appeal of the 1979 action is now pending before the Texas courts, although the status of that appeal is not material to our decision in this case.

On December 8, 1982 Judge Walker filed a motion to dismiss the civil rights case based upon the doctrine of judicial immunity and the district court's lack of subject matter jurisdiction. On August 21, 1984 the district court entered its order denying Judge Walker's motion to dismiss. Thereafter, on October 16, 1984, the district court refused to amend its August 21 order to provide for an interlocutory appeal under 28 U.S.C. § 1292(b). Notwithstanding the district court's refusal to certify, Judge Walker now appeals the denial of immunity.

---

[3] *Humble Exploration Co.* v. *Browning,* 677 S.W.2d 111 (Tex.App.—Dallas, 1984, no writ).

III

[1] A threshold issue we must first determine is whether this court has jurisdiction to hear this appeal. Orders denying absolute immunity are automatically appealable under *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949). *Williams* v. *Collins*, 728 F.2d 721 (5th Cir.1984). Accordingly, it appears certain that this court has jurisdiction to hear the appeal from the district court's denial of judicial immunity from suit for damages. Holloway, however, denies the appealability of the present order, citing *Collins:*

> We caution that, despite the rule we announce today, many denials of claimed immunity in pretrial proceedings will not be in a posture for appellate review, in that entitlement to immunity *will turn on disputed questions of fact or will otherwise be inextricably bound up with the merits of the claims.*

Collins at 726 n. 7 (emphasis supplied). However, taking all well pleaded facts as true, we nevertheless find the complaint is insufficient to avoid Judge Walker's immunity. The caveat of footnote 7 therefore does not apply, and the order denying immunity is appealable.

IV

A

[2] It is a well established rule that where a judge's absolute immunity would protect him from liability for the performance of particular acts, mere allegations that he performed those acts pursuant to a bribe or conspiracy will not be sufficient to avoid the immunity. *Sparks* v. *Duval Ranch Co.*, 604 F.2d 976 (5th Cir.1979) (en banc), *aff'd sub nom. Dennis* v. *Sparks*, 449 U.S. 24, 101 S.Ct. 183, 66 L.Ed.2d 185 (1980). In *Sparks* we said:

> The material allegations in this case are . . . that [the] state judge . . . conspired with the four private defendants to deprive the plaintiffs of their oil production. This the judge did by entering an injunction, within his judicial powers to

> grant, prohibiting plaintiffs from producing certain oil. It is claimed that one of the defendants . . . bribed him to do this, while the other two, in knowing furtherance of the conspiracy, acted as sureties for the injunction bond. [the state judge] was, of course, unqualifiedly immune from suit for the damages occasioned by his judicial act, and as to him the suit was correctly dismissed.

Sparks at 978,

[3] The Supreme Court affirmed this court's holding: "As the case comes to us, the judge has been properly dismissed from the suit on immunity grounds." 101 S.Ct. at 186. Notwithstanding *Sparks,* Holloway strongly contends that the acts of conspiring and taking a bribe are not "judicial acts" even when directed at inducing a judge to take action for which he is entitled to absolute immunity. Holloway relies on *Rankin* v. *Howard,* 633 F.2d 844 (9th Cir.1980), as support, noting that judicial immunity extends only to "judicial acts" performed without "a clear absence of all jurisdiction." *Stump* v. *Sparkman,* 435 U.S. 349, 98 S.Ct. 1099, 1105-07, 55 L.Ed.2d 331 (1978). The *Rankin* court "conclud[ed] that a judge's private prior agreement to decide in favor of one party is not a judicial act," 633 F.2d at 847, and, accordingly, denied immunity for damages resulting from a decision predicated on such a prior agreement. This court does not follow *Rankin;* rather, we defer to the Supreme Court and our own en banc decision. Moreover, even if this were a case of first impression, we would decline to follow the Ninth Circuit's path simply because this aspect of *Rankin* is inconsistent with the fundamental policies underlying judicial immunity.

Among the first cases incorporating judicial immunity into federal jurisprudence was *Bradley* v. *Fisher,* 13 Wall. 335, 20 L.Ed. 646 (1872), which identified five reasons for immunity: first, and most important, a judge must be free to act upon his own convictions, without apprehension of personal consequences to himself; second, the controversiality and importance of the

competing interests in contest before a court make it likely that the inevitable losing party may be overly willing to ascribe malevolent motives to the judge; third, judges faced with the prospect of damages actions would be driven to wasteful and distractive self-protection devices, such as excessive record-keeping; fourth, alternative remedies such as appeal and impeachment reduce the need for private rights of action against judges; and, fifth, the ease of alleging bad faith would make a qualified "good faith" immunity virtually worthless. *Bradley*, 13 Wall. at 347-54. These factors retain their vitality today. *Butz* v. *Economou*, 438 U.S. 478, 98 S.Ct. 2894, 2912, 57 L.Ed.2d 895 (1978). To them one may add the need for finality of judgment.

There is little question that each of the *Bradley* factors applies as forcefully in cases, such as this one, involving allegations of conspiracy or bribery as to cases involving allegations of judicial "bad faith." It requires little skill or imagination to convert many allegations that a judge has ruled in "bad faith" into allegations that he conspired to do so or was bribed; thus, the threat to disinterested decision-making is similar. An embittered, losing party is just as likely to allege bribery or conspiracy as any other malevolent motive of a judge. The possibility that judges will be driven to wasteful and distracting self-protective measures is just as great where liability could flow from conspiracy or bribery charges as from a charge of "bad faith." The same alternative remedies of appeal and impeachment (and in Texas, recourse to the voters) are available where the judge was bribed to commit an unsavory act or conspired to commit the act as where he simply commits acts in "bad faith." Finally, the threat to the finality of decision-making is the same where one alleges a judge conspired or was bribed to abuse his office as where one alleges he abused it in "bad faith." In summary, the need for a private right of action against a judge is no greater and the threat to the independence of judicial decision-making is no less where the

allegations are of conspiracy or bribery than where the allegations are of bad faith, personal interest or outright malevolence. Thus, where the alleged harm, though resulting from a bribe or conspiracy, was inflicted by acts to which absolute immunity would apply, the complaint is insufficient to avoid judicial immunity. Accordingly, the complaint in the present case is sufficient to avoid Judge Walker's absolute immunity only if it alleges harm that did not result from the acts to which his immunity applies, and this it fails to do.

B

[4] All of the harms Judge Walker is claimed to have caused are alleged to have been perpetrated by him through judicial acts not performed in the clear absence of all jurisdiction; accordingly Judge Walker's immunity bars a damages claim against him for these harms.

The complaint alleges that Judge Walker arranged to have cases brought in his court, placed the Humble Oil Company into receivership, discharged many of its key employees, posted in its corporate headquarters guards who intimidated and frightened its personnel, seized control of all of its stock, and appointed an incompetent receiver for the company. The complaints further allege that many of these acts were committed in open defiance of a proscriptive writ of the Texas Court of Appeals ordering him to desist from interference in the affairs of the Humble Corporation. Holloway urges that this proscriptive writ clearly deprived Walker of all jurisdiction and thus stripped him of judicial immunity from liability for these acts. We do not agree.

Judicial immunity does not extend to acts committed with a clear absence of all jurisdiction. However, the term "jurisdiction" is to be broadly construed to effectuate the policies of guaranteeing a disinterested and independent judicial decision-making process. *Stump* v. *Sparkman*, 98 S.Ct. at 1005. Where a judge does not clearly lack all subject-matter jurisdiction, he

does not clearly lack *all* jurisdiction, and "the same principle of exemption from liability which obtains for errors committed in the ordinary prosecution of a suit where there is jurisdiction of both subject and person, applies in cases of this kind, and for the same reasons." *Bradley,* 13 Wall. at 352.[3] Judge Walker's was a court of general jurisdiction under Texas law; there is no question that he was generally empowered to conduct proceedings of the sort he conducted. "[I]n our view, it is . . . significant that there was no . . . statute and no case law . . . prohibiting . . . a court of general jurisdiction, from considering a petition of this kind." *Stump,* 98 S.Ct. at 1105.

Holloway argues that the Texas Court of Appeals clearly deprived Walker of all jurisdiction with its writ of mandamus, which ordered Walker to desist from interfering in the affairs of the Humble Corporation. In response, Walker argues that the mandamus order did not obviously apply to his orders promulgated in accordance with his court's control of the Humble stock owned by Holloway, but only to orders concerning Humble which were promulgated pursuant to the Humble corporate receivership. Whatever the merits of Walker's argument, it is indisputable that the mandamus did not purport to determine that Walker's court was without general subject-matter jurisdiction. Indeed, the Texas Court of Appeals did *not* characterize its writ as a determination that Judge Walker was without all subject-matter jurisdiction; rather, the Texas Court of Appeals noted that Judge Walker's court did have subject-matter jurisdiction, but that he was acting in excess of that jurisdiction in continuing to conduct proceedings in the face of an effective order to desist: *"If our order became effective immediately, . . . then* the trial court was without jurisdiction." *Humble Exploration Co.* v. *Walker,* 641 S.W.2d 941, 943 (Tex.App.—Dallas 1982, no writ). The mandamus order in this

---

[3] *Rankin* appears to misinterpret fundamentally this quoted language.

case did not even suggest, much less expressly determine, a clear absence of all subject-matter jurisdiction; accordingly, he had sufficient jurisdiction for section 1983 immunity purposes, even if he was without sufficient jurisdiction to conduct proceedings under Texas law.[4]

Nor is Walker alleged to have caused harm through acts other than the misuse of his court's power to issue injunctions and place the parties before him into receivership. But for those obviously "judicial acts," none of the harm Walker is alleged to have caused would have come about. As noted above, it is irrelevant that Walker is alleged to have performed those acts pursuant to a bribe or a conspiracy; they remain "judicial act."

[5] Holloway argues that many of Walker's acts were not "judicial" because they were performed outside the courtroom[5] and that Walker eventually came to act more like the chief executive officer of the Humble corporation than like a judge. Holloway cites the four factors set out in *McAlester* v. *Brown*, 469 F.2d 1280 (5th Cir. 1972) as relevant to the determination of whether an act is "judicial": (1) whether the precise act complained of was a normal judicial function; (2) whether the events involved occurred in the courtroom or adjunct spaces, such as the judge's chambers; (3) whether the controversy centered around a case then pending before the judge; and (4) whether the act arose directly and immediately out of a visit to the judge

---

[4] We do not, of course, intimate that a mandamus order from an intermediate court of appeals would have been alone sufficient to deprive Judge Walker of all jurisdiction for immunity purposes even if the order had clearly stated that his court was without subject-matter jurisdiction. It is noteworthy that the Texas Supreme Court does not consider a judge to be exposed to suit under Texas law merely because he would be subject to a mandamus order. *Turner* v. *Pruitt*, 161 Tex. 532, 342 S.W.2d 422 (1961).

[5] Specifically, Holloway draws attention to meetings among the defendants, held in a hotel near the courthouse and in courthouse hallways, at which Humble's affairs were considered.

in his official capacity. *McAlester* at 1282. As with "jurisdiction," the term "Judicial act" must be broadly construed to realize the policies behind immunity; while the four-part *McAlester* test will often suffice to determine that an act is "Judicial," it is not the only test, and each of its factors are not to be given equal weight in all cases. For example, in exigent circumstances judges sometimes issue arrest or search warrants in police stations or in their own homes; in such cases, as here, the second *McAlester* factor will be lacking, but the act is obviously "judicial." The Supreme Court has forcefully indicated that the limits of judicial immunity are not to be set by subtle legalistic distinctions; rather, a broad functional approach is required: "Judges have absolute immunity not because of their particular location within the Government but because of the special nature of their responsibilities." *Butz*, 98 S.Ct. at 2913. Even administrative officials acting as judges, often without courtrooms or chambers, and without the technical jurisdictional confines of a state or federal court, nevertheless are protected by absolute judicial immunity. *Id.* The same is true of private arbitrators and other "quasi-judicial" figures. *Austin Municipal Securities, Inc.* v. *National Ass'n of Securities Dealers, Inc.* 757 F.2d 676 (5th Cir. 1985). To place too much emphasis on the second *McAlester* factor in this case would be inconsistent with the broad functional approach of *Butz* and its progeny.[6]

The necessary functions of a judge often include administering remedies as much as determining the allocation of rights among the parties. On occasion a judge will find it necessary to administer a business, or a school district, or an entire prison system to effectively remedy a wrong. While the courts have traditionally drawn back from such detailed involvement in the affairs of the parties, that is no reason to deprive a judge of

---

[6] In some cases, as where a judge cites a person for contempt of court, the second *McAlester* factor may almost dispositively indicate the act is "judicial."

immunity. Texas law concededly allows for judicially imposed and monitored corporate receiverships; thus, Judge Walker's judicial acts might be alleged to be inappropriate, but cannot be described as judicial. Issuing injunctions and imposing a receivership in a case before the court are acts obviously satisfying factors (1), (3) and (4) of the *McAlester* test. That some of these acts may have occurred outside the courtroom is not particularly important where it is at least arguable that the nature of the remedy — the receiverships — might naturally entail such informal proceedings. Accordingly, we hold that the complaint fails to allege that Judge Walker acted other than in his judicial capacity.

V

Walker also appeals from the district court's denial of his motion to dismiss Holloway's claims for injunctive and declaratory relief. Holloway requests declaratory relief vacating various judgments entered by Walker and an injunction prohibiting Walker from unlawfully interfering with Humble's affairs in the future in either his official or private capacity.

A

[6,7] Because the denial of a motion to dismiss under Fed.R.Civ.P. 12(b)(6) is not appealable, we must dismiss Walker's appeal from the district court's denial of his motion to dismiss the equitable and declaratory claims brought under section 1983. Judicial immunity does not extend to suits for equitable and declaratory relief under section 1983. *Pulliam* v. *Allen*, ____ U.S. ____, 104 S.Ct. 1970, 80 L.Ed.2d 565 (1984). Accordingly, cases involving claims for equitable and declaratory relief do not implicate the policies underlying *Collins;* that case was bottomed on the need to minimize the possibility that a judge would be needlessly put through a trial on a damages claim that was precluded by judicial immunity.

B

[8, 9] Walker also moved in district court to dismiss the pendent state law claims against him; this motion was also denied. However, a state official is immune from suit in federal court for equitable relief based on state law because the eleventh amendment denies federal courts the jurisdiction to issue such injunctions against state officials. *Pennhurst State School & Hospital* v. *Halderman*, 465 U.S. 89, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984). Nor does this case fall under the "ultra vires" exception to eleventh amendment immunity. "[A] state officer may be said to act *ultra vires* only when he acts 'without any authority whatever' "; we have already seen that Walker's operative acts were judicial and not committed in the clear absence of all jurisdiction. *Pennhurst*, 104 S.Ct. at 908 n. 11. Thus, Walker is immune from suit for equitable relief based on state law.[7]

We therefore hold that Walker is immune from federal suit seeking equitable relief on state law grounds under *Pennhurst*. Accordingly, we reverse the district court and order all pendent state law claims, equitable and declaratory, as well as legal, dismissed.

VI

In this case we have determined that Judge Walker is not alleged to have committed acts which were either not "judicial acts" or "in the clear absence of all jurisdiction," as those terms are used in immunity analyses. We have therefore held that Holloway's claims for section 1983 damages and all of his pendent

---

[7] Because the issue of eleventh amendment immunity concerns a vital issue of jurisdiction as much as it concerns immunity, we must consider the question on our own motion. *Edelman* v. *Jordan*, 415 U.S. 651, 94 C.St. 1347, 1363, 39 L.Ed.2d 662 (1974); *Save the Bay, Inc.* v. *United States Army*, 639 F.2d 1100, 1102 (5th Cir., 1981); Fed.R.Civ.P. 12(h)(3). "[Eleventh Amendment] limitation . . . may be raised at any point in a proceeding." *Pennhurst*, 104 S.Ct. at 907, n.8.

Texas state law claims must be dismissed on immunity grounds. Finally, we have held that this court is without jurisdiction to hear an interlocutory appeal from the district court's denial of Walker's Rule 12(b)(6) motion to dismiss the equitable and declaratory claims against him brought under section 1983. Accordingly, we reverse the district court on all claims properly before us and dismiss all damage claims and all state law claims against Walker for failure to state a claim upon which relief may be granted. The remainder of the appeal is dismissed.

REVERSED IN PART, DISMISSED IN PART.

JOHNSON, Circuit Judge, dissenting.

I respectfully dissent. Under the current procedural posture of the instant case, the plaintiffs have sufficiently alleged acts committed after the Texas Court of Appeals' mandamus order which were in the "clear absence of all jurisdiction." *See Stump* v. *Sparkman*, 435 U.S. 349, 357, 98 S.Ct. 1099, 1105, 55 L.Ed.2d 331 (1978). Accordingly, I would affirm the district court's interlocutory decision that plaintiffs' cause of action against Judge Walker should not be dismissed on immunity grounds.

C-1

HUMBLE EXPLORATION COMPANY, INC.,
Pat S. Holloway and Sterling Pipeline Company, Relators,

v.

HONORABLE DEE BROWN WALKER,
FAIRWAY LAND COMPANY, ET AL., and
JANE H. BROWNING, ET AL., *Respondents.*

No. 05-82-00879-CV.

Court of Appeals of Texas, Dallas.

Aug. 30, 1982.

Corporation which was named operator in operating agreements governing oil wells brought action seeking a writ of prohibition against the 162nd Court, Dallas County, Dee Brown Walker, J., prohibiting the court from taking certain action in the temporary receivership of the corporation. The Court of Appeals, Whitham, J., held that Court of Appeals' order vacating a receivership became effective instanter, and therefore, trial court which imposed the receivership was without jurisdiction to continue the receivership following Court of Appeals' order, and writ of prohibition would be issued prohibiting trial court from taking action in temporary receivership which had been vacated.

Writ of prohibition issued.

Ted Z. Robertson, J., dissented and filed opinion.

1. Prohibition 1

The writ of prohibition is an extraordinary judicial writ that may be issued by a Court of Appeals as a court of special superior jurisdiction, directed to a court of inferior jurisdiction. Vernon's Ann. Const. Art. 5, § 6; Vernon's Ann.Civ.St. art. 1823.

2. Prohibition 1

Writ of prohibition should only issue with greatest of caution.

3. Prohibition 10(1)

Purpose of writ of prohibition may be to prevent inferior tribunal from exercising a jurisdiction which it has no lawful

right to exercise. Vernon's Ann. Const. Art. 5, § 6; Vernon's Ann.Civ.St. art. 1823.

4. Prohibition 1

The writ of prohibition as used in Texas has three principle functions: preventing interference with higher courts in deciding a pending appeal; preventing inferior court from entertaining suits which will relitigate controversies which have already been settled by issuing court and prohibiting trial court's action when it affirmatively appears that the court lacks jurisdiction. Vernon's Ann. Const. Art. 5, § 6; Vernon's Ann.Civ.St. art. 1823.

5. Appeal and Error 448
Prohibition 10(2)

Court of Appeals' order vacating a receivership became effective instanter, and therefore, trial court which imposed the receivership was without jurisdiction to continue the receivership following Court of Appeals' order, and writ of prohibition would be issued prohibiting trial court from taking action in temporary receivership which had been vacated.

6. Injunction 176

An order dissolving a temporary injunction is effective immediately even though not final.

7. Appeal and Error 448

Trial court was without jurisdiction to make orders which were of a nature consistent with an ongoing receivership after the Court of Appeals had vacated the receivership.

8. Appeal and Error 448

Corporation's failure to supersede trial court's appointment of a receiver did not permit trial court to continue the receivership despite Court of Appeals' order vacating the receivership.

9. Receivers 204

However and whenever a receivership ends, trial court must conduct necessary proceedings to discharge the receiver.

Louis P. Bickel, Bickel & Case, Dallas, James H. Keahey, Austin, James C. Allums, Jr., DeHay & Blanchard, Richard L. Jackson, Shuford, Jackson & Allen, David Ford Hunt, Jenkens & Gilchrist, Dallas, Rex H. White, Jr., O'Neill, Haase & White, Austin, for relators.

C. Taylor Ashworth, William J. Alloright, Humble Exploration Co., Inc., Dean A. Johnson, III, Joe Holt, pro se.

David Musselwhite, Akin, Gump, Strauss, Hauer & Feld, Dallas, Kenneth C. Raney, Jr., Houston, Michael V. Powell, Rain, Harrell, Emery, Young & Doke, R. Jack Ayres, Jr., Dallas, G. Michael Curran, Vinson & Elkins, Houston, G.H. Kelsoe, Jr., Kelsoe & Kelsoe, Dallas, Kenneth Stohner, Jr., Jackson, Walker, Winstead, Cantwell & Miller, John Fox Holt, Dallas, for respondents.

Before TED Z. ROBERTSON, CARVER and WHITHAM, JJ.

WHITHAM, Justice.

Humble Exploration Company, Inc., as relator, seeks a writ of prohibition against the Honorable Dee Brown Walker, Judge of the 162*nd* Judicial District Court of Dallas County, Texas, prohibiting the trial court from taking certain action in a temporary receivership of Humble which this court vacated on June 18, 1982. Our disposition of that matter and the nature of the dispute out of which this petition for writ of prohibition arose may be found in our opinion in *Humble Exploration Co.* v. *Fairway Land Company*, 641 S.W.2d 934 (Tex.App. 1982). We conclude that the writ of prohibition is necessary to protect and

enforce the jurisdiction of this court with respect to the temporary receivership of Humble. Accordingly, the writ of prohibition shall issue with respect to the temporary receivership of Humble.

Sterling Pipeline Company, Inc. and Pat S. Holloway, individually, as relators, seek a writ of prohibition against the Honorable Dee Brown Walker, Judge of the 162*nd* Judicial District Court of Dallas County, Texas, prohibiting the trial court from taking certain action in a temporary receivership appointed for each of these two relators. Appeals from the appointment of temporary receivers of Sterling and Holloway are still pending in this court and such appointments have not been vacated by this court. Accordingly, the petitions for writs of prohibition of Sterling and Holloway are denied.

[1—4] Under Tex. Const. art. V § 6 and Tex.Rev.Civ. Stat.Ann. art. 1823 (Vernon 1964), this court has jurisdiction to issue writs of prohibition to protect its jurisdiction. The writ of prohibition is an extraordinary judicial writ that may be issued by a Court of Appeals as a court of superior jurisdiction, directed to a court of inferior jurisdiction. The writ should only issue with the greatest of caution. Its purpose may be to prevent an inferior tribunal from exercising a jurisdiction which it has no lawful right to exercise. *Staples* v. *State*, 244 S.W. 1064 (Tex.Civ.App. — Dallas 1922, no writ), conforming to Supreme Court's answer to certified question in *Staples* v. *State*, 112 Tex. 61 245 S.W. 639 (Tex.1922); *Smith* v. *Grievance Committee, State Bar of Texas For Dist. 14-A*, 475 S.W.2d 396 (Tex.Civ.App. — Corpus Christi 1972, no writ). The writ of prohibition as used in Texas has three principal functions: (1) preventing interference with the higher courts in deciding a pending appeal; (2) preventing an inferior court from entertaining suits which will relitigate controversies which have already been settled by the issuing court; and (3) prohibiting a trial court's action when it affirmatively appears that the court lacks

jurisdiction. *Smith* v. *Grievance Committee, State Bar of Texas For Dist. 14-A, supra.* The present proceeding requires consideration of the third function — the absence of jurisdiction of the trial court.

[5] Under the facts of the present proceedings we must first decide when our order vacating the receivership became effective. If our order became effective immediately, even though not final, then the trial court was without jurisdiction to continue the receivership following our order. At this time our mandate in *Humble Exploration Co.* v. *Fairway Land Company, supra,* has not issued. At oral argument Judge Walker conceded that following our order vacating the receivership of Humble, the then existing receivership of Humble had continued in operation after our order and was in operation at the time of oral argument. Humble contends that our order vacating the receivership of Humble operated instanter. The parties opposing issuance of the writ contend that our order vacating the receivership is not yet effective, absent the issuance of our mandate. We conclude that our order vacating the receivership operated instanter. We hold, therefore, that the trial court was without jurisdiction to continue the receivership following our order. After our order, all that remained for the trial court to do was to conduct the necessary proceedings to discharge the receiver.

[6] We arrive at our holding by analogy to appellate orders dissolving temporary injunctions on appeal. An order dissolving a temporary injunction is effective immediately even though not final. *Poole* v. *Giles*, 151 Tex. 224, 248 S.W.2d 464 (1952) *citing Alpha Petroleum Co.* v. *Terrell*, 122 Tex. 257, 59 S.W.2d 372 (1933); *Duncan* v. *Boyd*, 288 S.W. 281 (Tex.Civ.App. — Austin 1926, no writ). *Duncan* addressed the issue as follows:

> The only question in the case is whether a judgment of the Court of Civil Appeals, dissolving a temporary injunction of the trial court, operates instanter.

* * * * * *

> When such appeal is perfected, the jurisdiction of the trial court determines and that of the appellate court attaches. No further orders in the matter can be made by the trial court pending the appeal.

* * * * * *

> It would seem necessarily to follow from this holding that the orders of the appellate court, affecting the injunctive relief granted or denied by the trial court, should be effective immediately.... [T]here ought to repose in some tribunal the continuing power over the subject matter. Since the appeal divests the trial court of all jurisdiction in the matter, and transfers that jurisdiction to the appellate court, the latter, in order to make the relief effective, should have the same power as the trial court originally had, and its orders and decrees should have the same effect.... *Duncan* v. *Boyd,* 288 S.W. at 282.

In adopting *Duncan* the Supreme Court in *Alpha Petroleum Co.* stated:

> "We are of the opinion that, when the Court of Civil Appeals at Beaumont entered its final order and decree dissolving the temporary injunction granted in this cause by the district court of Montgomery County, Tex., such order and decree of dissolution so entered by the Court of Civil Appeals became effective at once, and therefore no injunction has been in effect protecting the Alpha Petroleum Company from the proration orders of the Commission since the date of the dissolution thereof by the Court of Civil Appeals. *Duncan* v. *Boyd* (Tex.Civ.App.) 288 S.W. 281."
>
> *Alpha Petroleum Co.* v. *Terrell,* 59 S.W.2d at 373.

Since an order of an appellate court dissolving a temporary injunction is effective immediately even though not final, we see no reason why an order of an appellate court vacating the more drastic remedy of a temporary receivership should not also be effective immediately, even though not final. It is just as important that a party, over whose property a receiver is

improperly appointed, instanter have back his property from the hands of the court as it is that a party improperly enjoined, instanter must no longer conduct his affairs as ordered by a court. The need for an immediate end to judicial interference, be it by injunction or receivership, is the same under both circumstances and is compelling of the same instanter relief.

Parties opposing issuance of the writ argue that provisions for rehearing and mandate require that our order vacating the receivership become final only upon issuance of the mandate. We do not agree. Losing parties file motions for rehearings in temporary injunction cases. Mandates issue in temporary injunction cases. If motions for rehearings and mandates do not prevent orders dissolving temporary injunctions from becoming effective immediately, even though not final, then motions for rehearing and mandates should not, for the same reasons, prevent orders vacating temporary receiverships from becoming effective immediately, even though not final.

Parties opposing issuance of the writ also argue that an injunction and a receivership differ in operation in that a receivership is under the direct day-to-day supervision of the court while an injunction is not. They contend that this difference requires that our judgment vacating the receivership become final only upon issuance of the mandate. We do not agree. Both injundction and receivership constitute judicial interference in the affairs of parties in litigation. If appeal determines that such interference should end, then the time that interference ends should be uniform regardless of the means of imposition of the interference. Our Supreme Court holds that, with respect to a temporary injunction, the interference ends immediately upon order dissolving the temporary injunction. In our case, one of first impression in this state, we hold with respect to a temporary receivership, that the interference ends immediately upon our order vacating the temporary receivership.

[7] Parties opposing the issuance of the writ also assert that the orders of Judge Walker following our judgment vacating the receivership related to merely everyday business of the receivership and, as such, did not interfere with this court's jurisdiction so as to warrant the writ of prohibition. We do not agree. The orders in question are of a nature consistent with an ongoing receivership, which, by our order has been vacated. Consequently, the court was without jurisdiction to make those orders.

[8] Parties opposing the issuance of the writ further contend that Humble's failure to supersede the trial court's appointment of a receiver permits the trial court to continue the receivership despite our order vacating the receivership. We do not agree. Our order vacating the receivership became effective immediately; therefore, nothing remained of the trial court's appointment even if it had been theretofore superseded. Failure to file supersedeas cannot be held to deny or postpone the relief granted by this court.

No party cites *New Birmingham Iron & Land Co.* v. *Blevins*, 40 S.W. 829 (Tex.Civ.App.—1897, error ref'd), however, we note the case. *Blevins* involved the question whether the receiver whose appointment was revoked on appeal was entitled to compensation until the time of the filing of the mandate. In answering that question the court said:

> Until the mandate of the court of civil appeals was issued and filed in the district court, the appellee Reagan had no official notice of the revocation of his appointment of receiver, and his duties as such continued until such mandate was filed in the court below; and having continued to discharge his duties until then, he was entitled to compensation for his services up to that time.

To the extent that *Blevins* can be read to hold that an appellate order vacating a receivership does not become effective until the mandate issues, we decline to follow it. *Blevins* was decided long before *Pool, Alpha Petroleum,* and *Duncan, supra.* Since, under those cases, an order dissolving a temporary injunction

became effective immediately, although not final, reason dictates that the same rule should be applied to an order vacating a temporary receivership. If, by mandatory injunction, the trial court required Humble to suffer certain things then, upon an appellate order dissolving that injunction, Humble would immediately be free of judicial interference and able to conduct its affairs as it wished. If, by a receivership, the trial court caused Humble to suffer the same certain things, then, upon appellate order vacating that receivership, Humble should also immediately be free of judicial interference and able to conduct its affairs as it wishes.

[9] However and whenever a receivership ends, the trial court must conduct the necessary proceedings to discharge the receiver. Those proceedings ordinarily include:

1.) A final accounting submitted by the receiver and approved by the court and the fixing of the amount of the receiver's fees and ordering them paid, *Shell Petroleum Corp* v. *Grays,* 87 S.W.2d 289, 292 (Tex.Civ.App.—Waco 1935) 131 Tex. 515, 114 S.W.2d 869 (Tex. Comm'n. App. 1938, opinion adopted).

2.) Restoration of the property held by the receiver to the owner of the property, *see, Kirby Lumber Co.* v. *Cunningham,* 154 S.W. 288 (Tex. Civ. App.—Galveston 1913, no writ).

3.) An order entered by the trial court discharging the receiver, *Houlle* v. *Martin,* 35 S.W.2d 785 (Tex. Civ. App.—Texarkana 1931, no writ).

Just because these and similar steps must be taken in the trial court to conclude the receivership, it does not mean that our order vacating a receivership should be deemed to become effective only upon issuance of the mandate. We hold that our appellate order vacating the receivership, and not the issuance of the mandate, reduced the trial court's jurisdiction to those limited orders concluding the receivership. In the present case, the trial court had no jurisdiction to conduct a continuing, ongoing

receivership of Humble Exploration Company, Inc., or its property, assets and business. The trial court had jurisdiction only to conduct the necessary proceedings to conclude the receivership; however, the trial court entered the orders provoking the application for writ of prohibition.

Accordingly, writ of prohibition shall issue as follows: The Honorable Dee Brown Walker, Judge of the 162*nd* Judicial District Court of Dallas County, Texas, is hereby ordered, and directed, immediately upon receipt of this opinion which issues as and for the writ of prohibition, to vacate all orders of that court entered since June 18, 1982, and to absolutely desist and refrain from taking or permitting any further action or proceeding in the receivership of Humble Exploration Company, Inc., or any of its property, assets and business, which receivership was vacated by this court in its cause number 05-82-00673-CV styled *"Humble Exploration Co., Inc.* v. *Fairway Land Company"* by order dated June 18, 1982, and by opinion dated July 23, 1982, except as necessary to proceedings required to discharge the receiver of Humble Exploration Company, Inc., or any of its property, assets and business, which discharge proceedings the Honorable Dee Brown Walker, Judge of the 162*nd* Judicial District Court of Dallas County, Texas, is ordered and directed to commence forthwith.

TED Z. ROBERTSON, Justice, dissenting.

I respectfully dissent. The majority opinion clearly articulates the references upon which it relies in issuing this writ of prohibition. It is abundantly clear that the majority has determined to issue the writ of prohibition in order to prevent what it perceives to be an action of the trial court which affirmatively appears to be outside of the trial court's jurisdiction. The majority disregards the case precisely on point, *New Birmingham Iron & Land Co.* v. *Blevins,* 40S.W.829 (Tex.Civ.App.—1897, writ ref'd) and relies instead upon what it considers to be analogous cases dealing with the dissolution of temporary injunctions.

The central issue is whether the receiver is dissolved as of the date of this court's original announcement, or whether the receiver continues in force and effect until such time the mandate has been issued by this court, following the parties' applications for writ of error to the Supreme Court. In my opinion, the receiver remains in force and effect until such time as this court issues its mandate to the trial court.

The cases cited by the majority rely upon the fact that since the appeal divests the trial court of all jurisdiction over the temporary injunction, and transfers that jurisdiction to the court of appeals, the court of appeals should have the same power as the trial court originally had. This is, the court of appeals should have the authority to enter whatever order or decrees the trial court could have entered. The right to enter an injunction carries with it the correlative right to dissolve the injunction. In those instances in which the appeal divests the trial court of jurisdiction to dissolve the injunction, it is only natural that the court of appeals, as the court which has jurisdiction, should be legally authorized to dissolve the temporary injunction.

There is no absolute statutory right to supersede the operation of a temporary injunction. Rule 385 of the Texas Rules of Civil Procedure provides that appeal from an order granting or refusing a temporary injunction shall not have the effect to suspend the order appealed from, unless it shall be so ordered by the court or judge entering the order. *Id.* at § 385(d).

Since a party has no absolute right to supersede the entry of a temporary injunction, and since the appeal divests the trial court of jurisdiction, it is only logical that the court of appeals may enter such orders as the trial court could have entered. This includes, of course, the right to dissolve the temporary injunction notwithstanding a party's desire to file an application for rehearing or writ of error. In my opinion, however, the appointment of a receiver is more analogous to a permanent injunction than it is to a temporary injunction.

As with a permanent injunction, the party wishing to complain of the appointment of a receiver may post a supersedeas bond and thereby suspend the operation of a trial court's order appointing the receiver. The relator in this instance failed to file a supersedeas bond. Since we denied the relator's initial application for an injunction enjoining the trial court from entering further orders regarding the receiver, it is my opinion that the receiver remains in full force and effect until such time as the parties have had an opportunity to have their motions for writ of error decided by the Supreme Court, and until such time as we issue a mandate. In the words of the Supreme Court of California, a writ of prohibition "is not available where there is a plain, speedy, and adequate remedy in the ordinary course of law." *Bowles* v. *Superior Court of City and County of San Francisco*, 44 Cal.2d 574, 283 P.2d 704, 709 (1955).

I would deny the writ of prohibition.

COURT OF APPEALS
FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS
AT DALLAS

No. 05-82-00879-CV
FROM A DISTRICT COURT
OF DALLAS COUNTY, TEXAS

HUMBLE EXPLORATION COMPANY, INC.,
PAT S. HOLLOWAY, and
STERLING PIPELINE COMPANY,

Relators,

VS.

HONORABLE DEE BROWN WALKER,
FAIRWAY LAND COMPANY, ET AL, and
JANE H. BROWNING, ET AL,

Respondents.

**BEFORE JUSTICES ROBERTSON,
CARVER AND WHITHAM
OPINION PER CURIAM
SEPTEMBER 10, 1982**

In its opinion in this cause the court ordered that the writ of prohibition shall issue to the Honorable Dee Brown Walker, Judge, 162*nd* District Court, Dallas County, Texas; however, this court as a judicial courtesy to Judge Walker withheld issuance and service of the formal writ pursuant to TEX. R. CIV. P. 394. This court did so under the impression that Judge Walker would execute our orders in our opinion in this cause without issuance and service of the formal writ. It appearing that certain parties opposing issuance of the writ do not accept, or acquiesce in, this courtesy extended Judge Walker, it is

ordered that the writ of prohibition attached shall issue and be served in this cause.

PER CURIAM

Justice Robertson dissents.

WRIT OF PROHIBITION

No. 05-82-00879-CV

CAUSE PENDING IN THE COURT OF APPEALS, FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS AT DALLAS

HUMBLE EXPLORATION COMPANY, INC.,
PAT S. HOLLOWAY
and
STERLING PIPELINE COMPANY,

Relators

V.

HONORABLE DEE BROWN WALKER,
FAIRWAY LAND COMPANY, ET AL,
and JANE H. BROWNING, ET AL,

Respondents

THE STATE OF TEXAS

To: THE HONORABLE DEE BROWN WALKER, JUDGE OF THE 162*ND* DISTRICT COURT, DALLAS COUNTY, TEXAS:

In its cause number 05-82-00879-CV styled "Humble Exploration Company, Inc. et al v. Honorable Dee Brown Walker, et al" this court determined that a writ of prohibition should issue to you; therefore, you are hereby ordered and directed immediately on receipt of this writ:

(a) to vacate all order you have entered since June 18, 1982, in the receivership of Humble Exploration Company, Inc., or any of its property, assets and business which receivership was vacated by this court in its cause number 05-82-00673-CV styled "Humble Exploration Company, Inc. v. Fairway Land Company" by order dated June 18, 1982, and by opinion dated July 23, 1982; and

(b) to absolutely desist and refrain from taking or permitting any further action or proceeding in the receivership of Humble Exploration Company, Inc., or any of its property, assets and business, which receivership was vacated by this court in its cause number 05-82-00673-CV styled "Humble Exploration Co., Inc. v. Fairway Land Company" by order dated June 18, 1982, and by opinion dated July 23, 1982, except as necessary to proceedings required to discharge the receiver of Humble Exploration Company, Inc., or any of its property, assets and business, which discharge proceedings you are ordered and directed to commence forthwith.

Herein Fail Not, but of this writ, and how you have executed the same, make due return on or before the 27th day of September, 1982.

WITNESS THE HONORABLE CLARENCE A. GUITTARD, Chief Justice of the Court of Appeals, Fifth Supreme Judicial District of Texas, with the seal thereof annexed, at the City of Dallas, Texas, this the 10th day of September, A.D. 1982.

JEANNETTE JOHNSON,
Clerk of the Court of Appeals,
Fifth Supreme Judicial District
of Texas

By _____
Maxine Scott, Chief Deputy

Supreme Court, U.S.
FILED
NOV 6 1985
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 85-570

In The

Supreme Court of the United States

October Term, 1985

PAT S. HOLLOWAY,

Petitioner,

vs.

JUDGE DEE BROWN WALKER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT JUDGE DEE BROWN WALKER'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

KENNETH L. KING
BRUCE W. CLAYCOMBE
JONES, CLAYCOMBE & KING
2626 LTV Tower
1525 Elm Street
Dallas, Texas 75201
(214) 954-0123
Attorneys for Respondent Judge Dee Brown Walker

November 4, 1985

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

BEST AVAILABLE COPY

15pp

QUESTION PRESENTED

Whether the Fifth Circuit Court of Appeals erred when it held that Respondent Judge Dee Brown Walker was judicially immune from a §1983 action for damages because the acts of Judge Dee Brown Walker were judicial acts, performed when Judge Walker had subject matter jurisdiction of the matter pending before him?

TABLE OF CONTENTS

	Pages
QUESTION PRESENTED	i
INDEX OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	2
CONCLUSION	7

INDEX OF AUTHORITIES

Pages

CASES:

Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1872) 2, 6

Dennis v. Sparks, 449 U.S. 24 (1980) 3

Holloway v. Walker, 765 F.2d 517 (5th Cir. 1985) 4, 5, 6

Hartford Acc. & Ind. Co. v. Farrell, 107 S.W.2d 442 (Tex. Civ. App.—Ft. Worth, 1937 writ dism'd) 5

Humble Exploration Co., Inc. v. Walker, 641 S.W. 2d 941 (Tex. App.—Dallas, 1982 writ ref'd n.r.e) 4

McHenry v. Bankers' Trust Co., 206 S.W. 560 (Tex. Civ. App.—Galveston, 1918 writ ref'd) 5

Pierson v. Ray, 386 U.S. 547 (1967) 2

Rankin v. Howard, 633 F.2d 844 (9th Cir. 1980), *cert. denied*, 451 U.S. 939 (1981) 3, 6

Stump v. Sparkman, 435 U.S. 349 (1978) 4, 5

Turner v. Raynes, 611 F.2d 92 (5th Cir. 1980) 5

United States v. Carver, 260 U.S. 482 (1923) 3

Ex Parte Virginia, 100 U.S. 339 (1879) 7

STATUTES:

42 U.S.C. §1983 ..... 2, 3

Tex. Rev. Civ. Stat. Ann., Art. 2297 5

No. 85-570

In The

Supreme Court of the United States

October Term, 1985

PAT S. HOLLOWAY,

Petitioner,

vs.

JUDGE DEE BROWN WALKER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT JUDGE DEE BROWN WALKER'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Judge Dee Brown Walker respectfully requests the Court to deny the petition for a writ of certiorari sought to overturn the opinion of the Fifth Circuit Court of Appeals in this case.

STATEMENT OF CASE

Humble Exploration Company, Inc. is now known as HECI Exploration Company, Inc. ("Humble"). Although Humble and Sterling Pipeline Company were parties to

the original district court action and to the appeal in the Fifth Circuit, they have not petitioned for a writ of certiorari. Petitioner Pat S. Holloway is no longer the owner of the stock of either of the companies.

After the Fifth Circuit's decision in this case, the District Court for the Northern District of Texas granted summary judgment in favor of Judge Walker on all the plaintiffs' claims under § 1983. That decision has been appealed by Petitioner Pat S. Holloway. The appeals of Humble and Sterling Pipeline Company were dismissed by the Fifth Circuit at the request of Humble and Sterling Pipeline Company on August 12, 1985. Petitioner Pat S. Holloway's motion for reconsideration was denied on September 16, 1985.

REASONS FOR DENYING THE WRIT

1. All acts of Respondent Judge Dee Brown Walker alleged to have damaged Petitioner were "judicial acts".

Federal law has clearly established that judges of courts of general jurisdiction are absolutely immune from monetary liability "for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly." *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 351 (1872). It is also established that judicial immunity is in no way diminished in a proceeding under 42 U.S.C. § 1983. *Pierson v. Ray*, 386 U.S. 547 (1967).

The Fifth Circuit Court of Appeals was correct in deciding Respondent Judge Walker had absolute judicial immunity for the conduct alleged in the civil rights complaint against the judge. The Fifth Circuit correctly re-

lied on *Dennis v. Sparks*, 449 U.S. 24 (1980). In *Dennis v. Sparks* the essential claim of plaintiff was that an "injunction had been corruptly issued as the result of a conspiracy between the judge and the other defendants . . ." *Id.* at 27. This court stated, "The courts below concluded that the judicial immunity doctrine required dismissal of the § 1983 action against the judge . . . ., and as the case comes to us, the judge has been properly dismissed from the suit on the immunity grounds." *Id.* at 28.

Petitioner argues, however, that the Fifth Circuit has placed too much reliance on *Dennis v. Sparks* and should follow the Ninth Circuit case of *Rankin v. Howard*, 633 F.2d 844 (9th Cir. 1980), *cert. denied*, 451 U.S. 939 (1981), apparently because a writ of certiorari was denied that case by this Court. "The denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times." *United States v. Carver*, 260 U.S. 482, 490 (1923).

Furthermore the *Rankin* case is easily distinguished from the case before the court. In *Rankin* the Ninth Circuit stated:

> If, as alleged, Judge Zeller knew the jurisdictional allegations to be fraudulent, or if valid Kansas statutes expressly foreclosed personal jurisdiction over a proposed ward in *ex parte* proceedings for temporary guardianship, then the judge acted in the clear and complete absence of personal jurisdiction. If his acts were part of a conspiracy, he is properly held responsible for the consequences.

In view of the suggested complete lack of jurisdiction, the *Rankin* case may be viewed as correctly decided because it remanded the case for further factual inquiry on that issue since there was evidence in the record suggesting that Judge Zeller knew he had no jurisdiction in the case.

2. All acts of Respondent Judge Walker were not performed in the clear absence of all jurisdiction.

In the instant case the Fifth Circuit has decided correctly that Judge Walker had subject matter jurisdiction over the proceedings at all times. 765 F.2d at 530-531; Appendix to Petition for Certiorari at B-14, 15.

Again Petitioner argues that the Fifth Circuit has misconstrued *Stump v. Sparkman*, 435 U.S. 349 (1978) which held that absolute judicial immunity does not extend to acts performed in the clear absence of all jurisdiction. However, as this Court pointed out, the term "jurisdiction" must be construed broadly where the issue is the immunty of the judge. *Id.* at 357.

Petitioner contends that the Dallas Court of Appeals decision expressly informed Judge Walker of his lack of jurisdiction to continue the receivership. Petitioner fails to mention that the receivership to which the Dallas Court of Appeals addressed itself was the receivership of Humble, a company which is not a party to this petition. The receivership over the assets of Petitioner Pat S. Holloway was not dissolved. The court of appeals stated:

> Appeals from the appointment of temporary receivers of Sterling and Holloway are still pending in this court and such appointments have not been vacated by this court. Accordingly, the petition for writs of prohibition of Sterling and Holloway are denied.

Humble Exploration Co., Inc. v. Walker, 641 S.W.2d 941, 9 (Tex. App.—Dallas, 1982 writ ref'd n.r.e.); Appendix to Petition for Certiorari at C-4.

Furthermore as the Fifth Circuit pointed out, the writ of prohibition issued by the Dallas appellate court "did not purport to determine that Walker's court was without gen-

eral subject matter jurisdiction . . . " 765 F.2d at 530; Appendix to Petition for Certiorari at B-14. And as the court pointed out in footnote 4, "[T]he Texas Supreme Court does not consider a judge to be exposed to suit under Texas law merely because he would be subject to a mandamus order."

Under Texas law, a district court is one of general jurisdiction and is responsible for the actions of any receiver it appoints and the affairs of any business over which a receiver has been appointed. Tex. Rev. Civ. Stat. Ann., Art 2297; *Hartford Acc. & Ind. Co. v. Farrell,* 107 S.W.2d 442 (Tex. Civ. App.—Ft. Worth, 1937 writ dism'd); *McHenry v. Bankers' Trust Co.,* 206 S.W. 560 (Tex. Civ. App.—Galveston, 1918 writ ref'd). Judge Walker's decisions with regard to the operation of the business of Humble were judicial acts.

The quoted language from *Turner v. Raynes,* 611 F.2d 92 (5th Cir. 1980) contained in the petition for certiorari is misleading and taken out of context. *Turner* involved a court of limited jurisdiction, a justice court. The quoted language was describing the limitation of judicial immunity of the judge of a court of limited jurisdiction. As pointed out by both the *Turner* court and this court in *Stump v. Sparkman,* 435 U.S. 349 (1978), a court of general jurisdiction, such as the court of Judge Walker, is quite another matter.

3. The efficient administration of justice is furthered by denying the petition for certiorari because of the fundamental policies underlying absolute judicial immunity.

The Fifth Circuit wrote that even if the case before it were one of first impression, it would decline to follow

Rankin v. Howard, supra, because it was "inconsistent with the fundamental policies underlying judicial immunity". 765 F.2d at 527; Appendix to Petition for Certiorari at B-11.

The reasons enumerated for the necessity of judicial immunity by this Court in *Bradley v. Fisher,* 80 U.S. (13 Wall.) 335 (1872) are no less valid 113 years later. Those are:

1) a judge must be able to act upon his own convictions;

2) the competing interests and controversy inherent in a contest before a court make it likely the losing party may ascribe malevolent motives to the court;

3) if judges are faced with the prospect of damage actions, they may be driven to distractive self-protection devices;

4) remedies such as appeal or impeachment decrease the need for private rights of action; and

5) the ease of alleging bad faith makes a qualified "good faith" immunity worthless.

Bradley, 80 U.S. (13 Wall.) at 347-54. The Fifth Circuit suggests that a sixth factor is the need for finality. 765 F.2d at 528; Appendix to Petition for Certiorari at B-12.

There is little difference between the ease of alleging "bad faith" and the ease of alleging conspiracy or bribery. In fact all *Bradley* factors retain their viability in cases of the sort before the court. *Id.*

4. Respondent Judge Walker did not violate any ministerial duty.

Petitioner's ministerial act argument is no more than his "non-judicial acts" argument in new garb and still does not pass muster. In *Ex Parte Virginia*, 100 U.S. 339 (1879), (a criminal habeas corpus case) the court distinguished "ministerial acts" from "judicial acts".

> Whether the act done by him was judicial or not is to be determined by its character, and not by the character of the agent. Whether he was a county judge or not is of no importance. The duty of selecting jurors might as well have been committed to a private person as to one holding the office of a judge. It often is given to county commissioners, or supervisors or assessors. In former times, the selection was made by the sheriff. In such cases, it surely is not a judicial act, in any such sense as is contended for here. It is merely a ministerial act, as much so as the act of a sheriff holding an execution, in determining upon what piece of property he will make a levy, or the act of a roadmaster in selecting laborers to work upon the roads.

The Writ of Prohibition issued to Judge Walker concerns conduct which only a judge is authorized to perform and is therefore by its character judicial conduct. This Court's distinction makes it clear that acts that can only be performed by a district judge are not ministerial acts.

———o———

CONCLUSION

For the above-enumerated reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

KENNETH L. KING
BRUCE W. CLAYCOMBE
JONES, CLAYCOMBE & KING
2626 LTV Tower
1525 Elm Street
Dallas, Texas 75201
(214) 954-0123

Attorneys for Respondent
Judge Dee Brown Walker